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Telephonic Search Warrants: A New Equation for Exigent Circumstances

Edward F. Marek

TELEPHONIC SEARCH WARRANTS: A NEW EQUATION FOR EXIGENT CIRCUMSTANCES

EDWARD F. MAREK*

FEDERAL LAW ENFORCEMENT OFFICERS may now obtain a search warrant without the affiant personally appearing before the issuing judicial officer. Rule 41(c)(2) of the Federal Rules of Criminal Procedure, authorizes a magistrate to issue a search warrant based upon sworn oral testimony communicated by telephone or other appropriate means "[i]f the circumstances make it reasonable to dispense with a written affidavit."[1] Federal investigative agents and attorneys[2] can now simply telephone or radio a magistrate and contemporaneously obtain a search warrant.[3] The Supreme Court and Congress sought to make obtaining a search warrant "administratively feasible" when circumstances and administrative obstacles make it difficult to timely obtain one through the traditional method of requiring the affiant to personally appear before a magistrate.[4] This 1977 amendment is consistent with the Supreme Court's oft-stated position which favors the use of search warrants except in limited situations.[5] Significantly, a search warrant not only interjects a third party to determine the existence of probable cause, but also defines and limits the object of the search and the

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* B.S., Ohio University; J.D., Case Western Reserve University; Federal Public Defender for the Northern District of Ohio; Adjunct Faculty, Cleveland-Marshall College of Law, Cleveland State University.

[1] FED. R. CRIM.P. 41(c)(2)(A). Additionally, Rule 41(c) provides, *inter alia*:

> (C) Issuance.—If the Federal[*sic*] magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. . . .
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> . . . .
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> (G) Motion to suppress precluded.—Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

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[2] The issuance of search warrants authorized under Rule 41 is limited to either "a federal law enforcement officer or an attorney for the government." FED. R. CRIM. P. 41(a).

[3] At least two other jurisdictions have authorized telephonic search warrants. CAL. PENAL CODE §§ 1526(b), 1528(b) (West Supp. 1974); ARIZ. REV. STAT. §§ 13-1444(c), 13-1445(c) (Supp. 1973). *See*, FED. R. CRIM. P. 41, 18 U.S.C.A., Notes of Advisory Comm. on Rules, at 46 (Supp. 1978).

[4] FED. R. CRIM. P. 41, 18 U.S.C.A., Notes of Advisory Comm. on Rules, at 46 (Supp. 1978).

[5] Coolidge v. New Hampshire, 403 U.S. 443 (1971) is a relatively recent example of the Court's preference for search warrants. In *Coolidge*, Justice Stewart, speaking for the Court, said:

> [T]he most basic constitutional rule . . . is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

Id., at 454-55 (quoting Katz v. United States, 389 U.S. 347, 357; Jones v. United States, 347 U.S. 493, 499; McDonald v. United States, 335 U.S. 451, 456).

property to be seized.[6] Therefore, the probable cause justification and, as importantly, the scope of the search are not determined by law enforcement officers "engaged in the often competitive enterprise of ferreting out crime."[7] Once a statement of probable cause is submitted to the magistrate, it is recorded and kept on file with the court.[8] This statement, whether in support of a telephonic or traditional warrant,[9] serves as a basis for a later judicial determination of its legality. The scope of the area searched and items seized may be examined in relation to the warrant.[10]

The availability of a telephonic search warrant affects most directly the body of decisional authority permitting warrantless searches where exigent circumstances exist. Most commonly the exception is in issue in searches of movable vehicles, such as automobiles and airplanes, and luggage at transportation terminals. It also has impact to a lesser extent on the question of whether a search warrant is required — absent exigent circumstances — to search a private dwelling in order to arrest an individual for whom an arrest warrant exists or where there is probable cause to believe an individual has committed a felony.

The availability of a telephonic or radio-obtained search warrant has changed the equation used by the courts in determining the exigency of a given situation which is claimed to justify a warrantless search. This Article will examine the change in the exigent circumstances equation. It will also focus on the impact of Rule 41(c)(2) on judicial remedies for warrantless searches. These remedies include suppression on traditional Fourth Amendment grounds, as well as the use of a federal court's supervisory power over the administration of criminal justice.

I. Searches For Objects

The courts have fashioned an exigent circumstances exception to the Fourth Amendment requirement of a search warrant where there exists an immediate need to search for objects in order to avoid the risk of loss of evidence, and where obtaining a timely search warrant by the traditional method of an affiant appearing before a magistrate would, in effect, be unreasonable because of conditions then existing.[11] The lapse of time in obtaining the warrant and the unavailability of a magistrate or state judge have been the usual obstacles.[12] Other related factors considered in granting

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[6] "Once a lawful search has begun, it is . . . far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' " United States v. Chadwick, 433 U.S. 1, 9 (1977).

[7] Johnson v. United States, 333 U.S. 10, 14 (1948).

[8] Fed. R. Crim. P. 41(c)(2)(D).

[9] Fed. R. Crim. P. 41(c)(2)(E).

[10] *See, e.g.*, United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972), *rev'd on other grounds*, 414 U.S. 338 (1974).

[11] Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[12] *See, e.g.*, Thomas v. Parett, 524 F.2d 779 (8th Cir. 1975); United States v. Ogden, 485 F.2d 536 (9th Cir. 1973). Both *Thomas* and *Ogden* are cases involving the seizure of drugs by law enforcement officers. In *Thomas*, the exigent circumstances exception justified the police in raiding an apartment without first obtaining a search warrant, where the defendants had processed heroin and were about to leave with the completed product. Similarly, in *Ogden*, the

the exception are: the time of day or night of the search; the lapse of time between obtaining probable cause and executing the search;[13] the distance from a magistrate; the number of agents available on the scene and the number available to assist those on the scene;[14] the mobility of the property to be searched;[15] and, the location, identity and custodial status of the suspect, accomplices, or owner of the property to be searched.[16]

The most expansive application of the exigent circumstances exception has been in cases where there existed an immediate need to search to identify and apprehend the suspects of a recent crime. A sufficient exigent circumstance which justifies a warrantless search has been found to be present when, for example, an instrumentality, such as a get-away car, is searched moments after a crime has occurred in order to enable the authorities to quickly locate the perpetrators of the crime.[17]

The presence or absence of one or more of these factors is generally determinative of whether a search warrant should or could have been timely obtained prior to a warrantless search and seizure of objects or documents.[18] Some of these factors are more dominant than others. In a situation where the object to be searched is a mobile vehicle in a public place, and sufficient law officers are available to obtain a warrant as well as guard the property, generally, no risk of loss exists. Thus, there is no exigency and a warrant is

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exception justified a federal agent in searching an airline passenger's baggage which smelled of marijuana. The court stated that, "[w]here the exigencies of time and the possible removal of the contraband to another state create an emergency, no warrant is required." 485 F.2d at 540.

[13] United States v. Free, 437 F.2d 631, 634-35 (D.C. Cir. 1970). In *Free*, the arresting officers discovered the appellant's auto while cruising in the general vicinity of the assault with which Free was subsequently charged. Only forty-five minutes elapsed between the commission of the crime and the arrest of Free and the search of his auto.

[14] In United States v. McCormick, 502 F.2d 281 (9th Cir. 1974), the court seemed to emphasize the fact that six secret service agents entered McCormick's house, placing him in custody immediately. However, the relevance of the number of agents may have been limited to whether McCormick's auto, the object of a subsequent search, was within his immediate control and therefore subject to being rapidly removed by the appellant. After considering the number of agents at the scene, the court said, "[m]oreover, even if he could have gained access to his car, he could not have driven it away, because a police car was blocking the driveway." *Id.*, at 287. *See*, United States v. Martin, 562 F.2d 673, 679 (D.C. Cir. 1977) ("[W]ith four agents guarding the terminal baggage area, there was obviously little likelihood that the suitcase could have been moved. . . .").

[15] Coolidge v. New Hampshire, 403 U.S. 443 (1971). *But see* United States v. Martin, 562 F.2d 673 (D.C. Cir. 1977). Chief Judge Bazelon cautioned that, "the inherent mobility of the object to be searched cannot, without more, justify a failure to secure a warrant. The question in each case . . . is whether, in light of the 'realities of the situation,' there was a reasonable likelihood that the item *would be moved* before a warrant could be obtained." 562 F.2d at 678 (emphasis in original).

[16] The inconvenience of guarding or securing the property to be searched with a special detachment of law enforcement personnel while a warrant is being obtained and the nature of the property to be searched, *e.g.*, whether it is contraband, have been mentioned as factors bearing on the issue of the presence of exigent circumstances. Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971). However, these considerations have been discredited in later cases. United States v. Martin, 562 F.2d 673, 679 (D.C. Cir. 1977) (search warrant required for dangerous contraband); United States v. Bradshaw, 490 F.2d 1097 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974).

[17] United States v. Robinson, 533 F.2d 578, 585-86 (D.C. Cir. 1976); United States v. Shye, 473 F.2d 1061, 1064-65 (6th Cir. 1973). The urgent need to identify and apprehend in these cases has outweighed the fact that the object to be searched was immobile and in the exclusive control of the police.

[18] *See* note 22, *infra*.

usually required.[19] Similarly, exigent circumstances were found not to exist where luggage at a transportation terminal was secure, the suspect was identified and a sufficient number of agents was available.[20] However, where the probable cause was obtained only a short time before the warrantless search and the time required to appear before a magistrate involved a possible risk of loss of the items sought, sufficient exigent circumstances were found to be present.[21]

The availability of a search warrant via telephone or other electronic means obviates much of the claimed exigency justification for a warrantless search for objects. As one court has stated, the determination of whether exigent circumstances exist "commands that analysis be shaped by the realities of the situation. . . ."[22] The reality, under Rule 41(c)(2), is that a search warrant is usually only a phone call away. Administrative obstacles heretofore cited for not securing a search warrant by appearing before a magistrate must now be examined in a different light. Such factors as the distance from a magistrate, the time required to appear before a magistrate, the normal business hours of a magistrate, the inconvenience of securing and dispatching additional agents to appear before a magistrate are now less determinative in justifying the exception. A magistrate, and a search warrant, can be as close as the nearest telephone or mobile radio. The mobility, and thus the risk of loss, of the object to be searched and property to be seized is reduced in importance. A typical two-person investigative team can "secure" the object of the search with minimized concern for the custodial status or location of the suspect. Even the exigency of an immediate need to search to identify and apprehend suspects is compromised. This conclusion was reached by one court which "wrestle[d] with the troubling question of when the police may rely on the indeterminate exception permitting [a] warrantless search in case of exigency."[23]

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[19] This situation is characterized as a potential exigency, rather than a present exigency. United States v. Robinson, 533 F.2d 578, 581 (D.C. Cir. 1976). In *Robinson*, the court justified waiving the necessity of a search warrant in a potential exigency case by weighing the mitigating factors: "a grave offense; a clear showing of probable cause; reasonable belief that the suspects are armed; a likelihood that the suspects will escape if not speedily apprehended, and peaceable entry." *Id.*, at 583. *See* note 17, *supra*, and Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (en banc).

[20] United States v. Martin, 526 F.2d 673, 674 (D.C. Cir. 1977) (suspect identified only as "a man named Jerry").

[21] For example, in Thomas v. Parett, 524 F.2d 779, 781 (8th Cir. 1975), probable cause was obtained at 2:00 p.m. and the search was conducted shortly after 2:15 p.m.; and in United States v. Ogden, 485 F.2d 536 (9th Cir. 1973) it seems that the search was conducted immediately after the federal agent obtained probable cause.

[22] United States v. Robinson, 533 F.2d 578, 581 (D.C. Cir. 1976). *See also* United States v. Flickinger, 573 F.2d 1349, 1354 (9th Cir. 1978), in which it is said that, "[o]rdinarily exigency does not evolve from one single fact. Indeed, we are often confronted with a mosaic — no one part of which is itself sufficient."

A district court's finding of exigent circumstances will not be disturbed unless it is clearly erroneous. 573 F.2d at 1357. The use of this standard has been sanctioned in United States v. Bradshaw, 515 F.2d 360, 365 (D.C. Cir. 1975) and United States v. Gargotto, 510 F.2d 409, 411 (6th Cir. 1974).

[23] United States v. Robinson, 533 F.2d 578, 585 (D.C. Cir. 1976). Prior to the enactment of Rule 41(c)(2) the *Robinson* court suggested the use of telephonic search warrants:

> A quite different matter, addressed not to the police officers so much as to the Police Chief and the responsible legal officers in this jurisdiction, is the possibility in case of

In determining whether to permit an exception to the constitutional mandate for the use of search warrants, courts will now be less willing to accept excuses for not securing a warrant in "emergency" situations. Given the reluctance of courts to carve out and expand exceptions to the requirement for search warrants, prosecutors will have to go much further to demonstrate sufficient exigency to justify the constitutionality of a warrantless search.

II. Search For Objects — Supervisory Power

Not only has the availability of a telephonic search warrant under Rule 41(c)(2) changed the equation for exigent circumstances for constitutional purposes, but non-use of this procedure also presents an independent basis for the exclusion of evidence obtained in a warrantless search — the supervisory power of the federal courts over the administration of criminal justice. Federal courts have enforced compliance with the requirements of the Federal Rules of Criminal Procedure through the use of this supervisory power. A clear statement by the Supreme Court of the existence and extent of supervisory power in connection with the Federal Rules of Criminal Procedure was long ago announced.

> A federal agent has violated the Federal Rules governing searches and seizures — Rules prescribed by this Court and made effective after submission to the Congress. . . . The power of the federal courts extends to policing those requirements and making certain that they are observed. . . .
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> To enjoin the federal agent from [utilizing the fruits of an illegal search] is merely to enforce the Federal Rules against owing obedience to them. The obligation of the federal agent is to obey the Rules. . . . They prescribe standards for law enforcement.[24]

The supervisory power is exercised by both federal circuit and district courts.[25] This supervision extends to federal criminal prosecutions as well as to investigations involving searches by federal agents and United States Attorneys conducted prior to the filing of a complaint, or absent an indictment

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emergency of obtaining warrants based on sworn oral testimony communicated by telephone or other appropriate means, with procedures for recording, transcribing and certifying the statement.

Id.

[24] Rea v. United States, 350 U.S. 214, 217-18 (1955). The Supreme Court has also used its supervisory power to enforce other provisions of the Federal Rules of Criminal Procedure. In Mallory v. United States, 354 U.S. 449 (1957) and McNabb v. United States, 318 U.S. 332 (1943), the Court excluded confessions given during an unreasonable delay in taking an arrestee before a judicial officer in disregard of Fed. R. Crim. P. 5(a).

[25] "The Federal [*sic*] judicial system contemplates supervision by the Federal [*sic*] district courts of the nation over the government attorneys and enforcement officers acting within their districts, a supervisory jurisdiction possessed in turn on review by the several courts of appeals and ultimately by the Supreme Court." Smith v. Katzenbach, 351 F.2d 810, 816 (D.C. Cir. 1965). *See, e.g.*, United States v. Payner, 434 F. Supp. 113, 125 (N.D. Ohio 1977) (exclusion of search evidence by a district court through the exercise of its supervisory power). *Accord*, United States v. Calandra, 465 F.2d 1218, 1223 (6th Cir. 1972), *rev'd on other grounds*, 414 U.S. 338 (1974); Silbert v. United States, 275 F. Supp. 765, 766-67 (D. Md. 1967).

being handed down by a grand jury.[26] The federal courts' supervisory authority can even extend to bar the testimony of a federal agent in a state prosecution where a search by federal agents is in violation of Rule 41.[27]

When the exigency of a situation is questionable, and the telephonic search warrant procedure is not used, persuasive grounds can be advanced for a court to invoke its supervisory power to exclude search evidence. This is particularly true where there has been communication via telephone between the agents on the scene and a prosecutor. Often, in conformity with policy, agents will telephone a federal prosecutor to review the circumstances of the imminent search and obtain verbal authorization. This is critical where a search is conducted in a claimed exigent situation without a telephonic search warrant because, in a word, if there was time to call the prosecutor there was time to call a magistrate.

There are policy arguments to support the use of a telephonic search warrant. The Advisory Committee Notes to Rule 41(c)(2) state that the rule was enacted to make it administratively feasible for federal investigative agents and attorneys to obtain search warrants where time, distance and other factors make it difficult to appear before an issuing magistrate.[28] This is a judicial as well as a congressional[29] statement of policy to encourage the use of search warrants.

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[26] "This independent anomalous jurisdiction extends to federal law enforcement officers who have failed to observe standards for law enforcement established by *federal rules governing searches and seizures*." United States v. Rapp, 539 F.2d 1156, 1160 (8th Cir. 1976) (emphasis added).

See also Mayo v. United States, 425 F. Supp. 119, 122 (E.D. Ill. 1977), in which the court stated that, "District Court [*sic*] jurisdiction under Rule 41(e) is supervisory in nature and derives from the inherent authority of Courts[*sic*] over those who are its officers. *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Richey v. Smith, 515 F.2d 1239 (5th Cir. 1975); Hunsucker v. Phinney, 497 F.2d 29 (5th Cir. 1974)."

[27] Rea v. United States, 350 U.S. 214 (1956). Rea had first been indicted in federal court where the illegally obtained evidence, which was the basis of the state court action, had been suppressed. In DeMaria v. Jones, 416 F. Supp. 291 (S.D.N.Y. 1976), the court suggested that *Rea* is limited to cases involving a violation of the Federal Rules of Criminal Procedure by federal agents. *Cf.* Wilson v. Schnettler, 365 U.S. 381 (1961) (evidence admitted — no prior federal court action and no allegation of illegal arrest or search).

This injunctive relief may only be applicable when a federal court has previously ruled on the legality of a federal search in connection with a federal indictment or a ruling on a motion for return of property under Rule 41(e). United States v. Navarro, 429 F.2d 928, 930-31 (5th Cir. 1970).

The search need not be conducted exclusively by federal agents in order to have the federal supervisory power applied. All that is required is that a federal agent "had a hand in it." Lustig v. United States, 338 U.S. 74, 78-79 (1949). *See*, Navarro v. United States, 400 F.2d 315, 316-18 (5th Cir. 1968).

[28] *See* note 4, *supra*.

[29] S. REP. No. 354, 95th Cong., 1st Sess. 10-11, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 533-35, wherein the Senate Judiciary Committee stated that:

> [t]he committee agrees with the Supreme Court that it is desirable to encourage Federal [*sic*] law enforcement officers to seek search warrants in situations where they might otherwise conduct warrantless searches by providing for a telephone search warrant procedure with basic characteristics suggested in the proposed Rule 41(c)(2). As the Supreme Court has observed, "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable."

While proposed rules and amendments to existing federal court rules are nominally the responsibility of the Supreme Court, they are, of course, actually drafted by committees within the Judicial Conference of the United States. *Id.* at 4, U.S. CODE CONG. & AD. NEWS at 528. The

To further facilitate their use, the judiciary has administratively caused the formulation and distribution of interim guidelines to assist magistrates and judges in the development of local court plans and procedures for applying the telephonic search warrant procedure.[30] The guidelines suggest that procedural and policy questions be discussed among magistrates, United States Attorneys and law enforcement personnel. They require district court plans to provide for a magistrate to be "on call" at all times to receive calls for search warrants, and for prosecutors to be a party to the telephone conversation. The guidelines further recommend criteria for establishing the need to dispense with written affidavits. The criteria appear to have been formulated with the exigent circumstances exception in mind.[31] Although these are only guidelines for magistrates and judges, and are not binding on agents or prosecutors, they do demonstrate judicial preference for the use of search warrants.

There is also an executive expression favoring the use of telephonic search warrants. The Department of Justice has issued directives to the United States Attorneys concerning the availability and use of the Rule 41(c)(2) procedure.[32] The Department of Justice has taken the position that the "implementation of a Federal [*sic*] search warrant system will not only be an effective enforcement tool but will provide further safeguards to the constitutional rights of all Americans."[33] Like the Administrative Office Guidelines, the Department of Justice has encouraged participation by prosecutors in the telephone conferences to obtain a search warrant. It has also suggested that Assistant United States Attorneys be "on call" to receive requests from agents for telephonic search warrants. The Department of Justice has also urged that meetings among magistrates, prosecutors and enforcement personnel be convened to discuss policy and procedure.

Thus, there are sufficient policy expressions favoring the use of this new

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rule authorizing telephonic search warrants was drafted by the Advisory Committee on Criminal Rules. It was then approved, in order, by the following bodies: the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress. A method of congressional approval of proposed rules and amendments is provided for in 18 U.S.C. § 3771 (1976).

[30] Memorandum from William E. Foley, (then) Deputy Director, Administrative Office of the U.S. Courts to all federal judges, U.S. magistrates, circuit executives, clerks of court, and federal public defenders. (Sept. 20, 1977) [hereinafter cited as Memorandum of Sept. 20, 1977]. The memorandum was authorized by the Judicial Conference Committee on the Administration of the Federal Magistrates System.

[31] 4. *Demonstrating Need for Dispensing With a Written Affidavit*

Criteria should be developed in each court to determine when and under what circumstances the telephonic procedure is acceptable. While conditions will vary from court to court, examples of such criteria could include the following:

(a) The agent cannot reach the magistrate in his office during regular court hours;
(b) The agent making the search is a significant distance from the magistrate;
(c) The factual situation is such that it would be unreasonable for a substitute agent, who is located near the magistrate, to present a written affidavit in person to the magistrate in lieu of proceeding with a telephonic application;
(d) The need for a search is such that without the telephonic procedure a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed.

Memorandum of Sept. 20, 1977, *supra* note 30.

[32] Memorandum from Benjamin R. Civiletti, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice, to holders of U.S. Attorney's Manual, Title nine, "Federal Telephone Search Warrant System" (Sept. 15, 1977) [hereinafter cited as Memorandum of Sept. 15, 1977].

[33] Memorandum of Sept. 15, 1977, *supra* note 32.

procedure. Federal agents and attorneys can be shown to be fully aware of its availability. Non-use may be in disregard of the policy of the Department of Justice or of a particular investigative agency. All of these considerations are relevant to a motion to suppress based on the court's supervisory power.[34]

To support suppression on supervisory, or constitutional grounds, an evidentiary hearing would be necessary to develop the factual basis. The agents and attorneys involved in deciding whether to telephone for a search warrant in a given situation would be necessary fact witnesses. Their knowledge of the availability of such a search warrant,[35] as well as their knowledge of agency and Department of Justice policy regarding their use, would be material.[36]

Consistent with the nature of federal supervisory power, empirical data concerning the frequency of use, or non-use, of telephonic search warrants in a particular jurisdiction, or nationwide, would also be relevant to the issues raised in an evidentiary hearing. Statistics on the incidence of use by judicial district are readily available. Strikingly, they have not been used frequently.[37]

Not all failures to follow the various requirements of Rule 41 will result in suppression of search evidence on non-constitutional grounds; however, some will.[38] The courts have employed various tests to determine whether the suppression remedy is appropriate for a failure to follow a particular requirement of Rule 41: was the provision intentionally and deliberately disregarded and if the rule had been followed might the search not have occured or not have been so abrasive;[39] or, was the procedural requirement

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[34] Investigative agency regulations, manuals, and guidelines must be made available to the public under the federal Freedom of Information Act, 5 U.S.C. § 552(a)(2)(C) (1970). They are also subject to subpoena under FED. R. CRIM. P. 17(c). *See, e.g.*, United States v. Leichtfuss, 331 F. Supp. 723, 739 (N.D. Ill. 1971), in which the court ruled that directives or memoranda of the Selective Service System as well as the Selective Service Form Manual are subject to disclosure under the Freedom of Information Act. But, the subpoena provision of FED. R. CRIM. P. 17(c) may not be used for purposes of conducting a fishing expedition. *See*, United States v. Moore, 423 F. Supp. 858, 860 (S.D. W. Va. 1976).

[35] A knowing and deliberate disregard of a provision of Rule 41 will allow the court to invoke its supervisory power and suppress the evidence gained thereby. United States v. Burke, 517 F.2d 377, 386-87 (2d Cir. 1975). *See*, notes 39 & 40, *infra*, and accompanying text.

> [V]iolations of Rule 41 alone should not lead to exclusion unless (1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) *there is evidence of intentional and deliberate disregard of a provision in the Rule.* (emphasis added).

Id.

This test has also been applied in United States v. Turner, 558 F.2d 46, 52 (2d Cir. 1977); United States v. Burgard, 551 F.2d 190, 193 (8th Cir. 1977). *See also*, United States v. McKenzie, 446 F.2d 949, 954 (6th Cir. 1971) (requiring a showing of prejudice).

[36] Intentional disregard of agency guidelines has resulted in suppression in other areas. United States v. Caceres, 545 F.2d 1182, 1187 (9th Cir. 1976), (violation of IRS regulations on consensual monitoring required suppression). *See also*, United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975). "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969).

[37] From October, 1977, to September, 1978, a total of 23 telephonic search warrants were issued nationwide. The figures may be obtained from the Magistrates Division, Administrative Office of the United States Courts, Washington, D.C.

[38] Rea v. United States, 350 U.S. 214 (1955). *See* note 24, *supra*.

[39] United States v. Burke, 517 F.2d 377, 386-87 (2d Cir. 1975).

designed to assure that federal agents act "reasonably" in conducting searches?[40]

Some of the provisions of Rule 41 are merely ministerial requirements defining the proper officer to execute a search warrant, or requiring the return of an inventory. However, since section (c)(2) bears directly on the reasonableness of the action of federal agents, it cannot be construed as a ministerial requirement. Knowledge by federal agents and attorneys of the availability of telephonic search warrants and their non-use in a claimed exigent situation might meet the test of being intentionally and deliberately disregarded. This would be particularly true where there was prior telephonic contact between the agents and prosecutor. A more compelling showing of exigency than has been heretofore sufficient will be required.

III. Searches For Persons

The availability of a telephonic search warrant also has impact on exigent circumstances in connection with the issue of whether a search warrant is required to enter a private dwelling to search for and arrest a person for whom there is an arrest warrant, or where there is probable cause to believe that a person committed a crime. At first blush, this appears to be essentially an issue dealing with the requirements of an arrest warrant and therefore Rule 41(c)(2) would be inapplicable as by its terms it deals only with search warrants. Arrest warrants are covered in Rule 4 of the Federal Rules of Criminal Procedure, which does not presently include a provision for securing an arrest warrant from a magistrate via telephone or other appropriate means.[41]

However a closer examination indicates that the availability of a telephonic search warrant does affect the law on arrests to a degree. The Supreme Court has decided that the Fourth Amendment's Warrant Clause[42]

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[40] United States v. Sellers, 483 F.2d 37 (5th Cir. 1973). "The proper test to be applied is whether a particular Rule 41 standard is one designed to assure reasonableness on the part of federal officers, or whether the provision merely blueprints the procedure for issuance of federal warrants." *Id.* at 44.

At issue in *Sellers* was the admissibility in a federal prosecution of evidence obtained jointly by federal and state personnel under a state-issued search warrant. The court assumed for purposes of argument that the federal involvement was sufficient to render the search a federal one. The warrant had been issued on a showing of probable cause that a violation of state law had been committed, and the appellant contended that evidence obtained under a state warrant was inadmissible in federal court because Fed. R. Crim. P. 41 governs federal warrants and requires that they be issued only for violations of federal law. *See* United States v. Brouillette, 478 F.2d 1171 (5th Cir. 1973).

The court found that despite the participation of federal officials the warrant had been issued under the authority of state law. Therefore, "every requirement of Rule 41 is not a *sine qua non* to federal court uses of the fruits of a search predicated on the warrant. . . ," and the evidence obtained under the state warrant was admissible in the federal prosecution. United States v. Sellers, 483 F.2d at 43.

The test applied in *Sellers* was criticized in United States v. Burke, 517 F.2d 377, 387 n.15 (2d Cir. 1975), although the court conceded that in most cases both the *Burke* and *Sellers* tests would produce the same result.

[41] If probable cause may be transmitted electronically to support a search warrant there appears to be no reason why it cannot likewise be transmitted to support an arrest warrant under Fed. R. Crim. P. 4.

[42] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

does not require an arrest warrant to arrest a person in a public place,[43] nor is an arrest warrant required when an agent is in "hot pursuit" from a public place into a private dwelling[44] and has probable cause to believe that the person pursued has committed an offense. The Court has left unanswered the question of whether, absent exigent circumstances, a "warrant" is required to arrest in a private dwelling.[45]

Two circuits have held that, absent exigent circumstances, agents with probable cause for a felony arrest must obtain a warrant before entering a dwelling to make an arrest.[46] The question persists, however, if a warrant is required, what kind of warrant — search, arrest, or both — is needed. Some decisions assume, without specifically addressing the issue, that an arrest warrant will suffice.[47] Other courts have suggested that a search warrant is required to enter, at least a third party dwelling, to search for and arrest a person believed to be inside.[48] Still another has said that the "distinction

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issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[43] United States v. Watson, 423 U.S. 411 (1976). Interestingly, the opinion of the Court, delivered by Justice White, fails to mention the phrase "public place" as a limitation on the ability of an officer to make a warrantless arrest. Rather, the opinion deals exclusively with the requirement of probable cause as a precondition to a warrantless arrest. It was left to the concurring opinions of Justices Powell and Stewart to explain that an officer who had probable cause could constitutionally make a warrantless arrest in a public place; the constitutionality of a warrantless arrest in a private place was not decided in *Watson*. *Id.*, at 426-27 (concurring opinion, Powell, J.), 433 (concurring opinion, Stewart, J.).

In a later case, however, Justice Rehnquist explained that *Watson* had held that "the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment." United States v. Santana, 427 U.S. 38, 42 (1976).

[44] United States v. Santana, 427 U.S. 38, 42-43 (1976). *See* Warden v. Hayden, 387 U.S. 294 (1967).

[45] The Warrant Clause speaks of "persons" and "seizures" and does not delineate between search and arrest warrants. *See* notes 42 & 43, *supra*.

[46] United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978); United States v. Reed, 572 F.2d 412, 418 (2d Cir. 1978).

Several courts have undertaken an enumeration of the factors which constitute "exigent circumstances." Generally, however, they rely upon those developed by Judge Leventhal in Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (en banc). *See* note 19, *supra*. The Second Circuit is one of those courts. United States v. Reed, 572 F.2d at 1350.

Both *Dorman* and United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978) failed to address the specific issue decided by *Prescott* and *Reed* because of the presence of exigent circumstances.

[47] United States v. Campbell, 581 F.2d 22, (2d Cir. 1978) (appeal pending); United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978); United States v. Reed, 572 F.2d 412 (2d Cir. 1978); United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976). *See* Dorman v. United States, 435 F.2d 385, 396 n.25 (D.C. Cir. 1970).

[48] This is the position taken by the United States Court of Appeals, Third Circuit, in Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974):

> This Court [*sic*] has made clear, however that arrest warrants are not substitutes for search warrants. . . . Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for those suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within.

Gereau reiterated the stance taken earlier in the same year in Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974). In *Fisher*, the court had declared that "a warrant for the arrest of a suspect may indicate that the police officer has probable cause to believe that the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home." *Id.*, at 341. *Contra*, United States v. James, 528 F.2d 999, 1017 (5th Cir. 1976) ("[a] search warrant was not necessary to execute an arrest warrant on the premises of a third party. . . .").

between a search warrant and an arrest warrant is an artificial one" as long as the warrant describes "the place to be searched and the persons or things to be seized."[49] Although the Supreme Court has not met this issue, Mr. Justice Powell raised it in *United States v. Watson*.[50]

Traditional interpretation of the Fourth Amendment's Warrant Clause supports a conclusion requiring a search warrant to enter a private dwelling to arrest another. Even those courts that have said a search warrant is not necessary have, nevertheless, required the police to have probable cause that the arrestee was in the dwelling.[51] Whenever a probable cause determination has been required, it has been a judicial preference to have a magistrate, and not the police, make the determination of sufficiency. The privacy interests involved in a search of a dwelling to arrest are significantly greater than those involved in an arrest in public. The intrusion, in an entry to search for a person, is equal to the intrusion in an entry to search for objects.[52] These arguments for requiring a search warrant, absent exigent circumstances, to enter and search a private dwelling in order to arrest have been recognized. Citing the need for a probable cause determination by a magistrate when a wanted person is presently within a private dwelling, a proposal has been made to amend Rule 41 to include "person" within the "objects" for which a search warrant may be used.[53]

[49] United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978). The *Prescott* court felt that this distinction was unimportant as long as the "warrant" described the place to be searched and the persons or things to be seized. Yet, this qualification applied by the court belies one of the fundamental differences between arrest and search warrants. A search warrant under Rule 41, either telephonic or upon written affidavit, must contain a description of the property being sought and the persons or places to be searched. FED. R. CRIM. P. 41(c)(1), (2)(E). However, arrest warrants under FED. R. CRIM. P. 4 require no such description.

It seems reasonable to assume, therefore, that the *Prescott* court would, if deciding this precise issue, require that a search warrant be issued. This would be preferable to judicially amending the arrest warrant requirements to include such a description.

[50] "[W]e do not today consider or decide whether or *under what circumstances* an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." 423 U.S. 411, 432-33 & n.7 (concurring opinion, Powell, J.) (emphasis added). *See* note 43, *supra*.

[51] United States v. James, 528 F.2d 999, 1017 (5th Cir. 1976); United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972).

[52] "A magistrate's disinterested determination that governmental intrusion is warranted is no less desirable when the policeman's quarry is a suspect, rather than a piece of evidence." United States v. Prescott, 581 F.2d 1343, 1349 (9th Cir. 1978).

[53] Rule 41. Search and Seizure

(a) AUTHORITY TO ISSUE WARRANT. A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property *or person* sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *OBJECTS* WHICH MAY BE SEIZED WITH A WARRANT. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; *or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.* (emphasis in original).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (Feb. 1978). The corresponding Advisory Committee Notes contain a discussion of the authority and rationale supporting this amendment.

The ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § ss 210.3(1)(d) (Proposed Official Draft 1975) also includes "an individual for whose arrest there is reasonable cause" as an authorized object of a search warrant.

If a search warrant is required to enter a private dwelling in order to arrest, the exigent circumstances exception comes into play. If the circumstances are sufficiently exigent, a search warrant will not be required to enter a private dwelling to search for a person where there exists probable cause to believe that that person committed a crime. Accordingly, the availability of a telephonic search warrant under Rule 41(c)(2) must be considered.[54]

IV. Conclusion

Courts are reluctant to apply an exclusionary rule, whether as a remedy to enforce a constitutional mandate,[55] or to give effect to criminal procedural rules by use of supervisory power.[56] But they are not anxious to expand judicially-fashioned exceptions to the constitutional requirement for search warrants.[57] They have, however, recognized the need on occasion to conduct warrantless searches, as in the exigent circumstances exception.

In light of the enactment of Rule 41(c)(2), the exigent circumstances exception requires that new standards be applied prior to the recognition of such an exception. The usual factors contributing to an exigent circumstance exception, such as the lapse of time in obtaining a traditional search warrant and the unavailability of a magistrate or judge, are no longer sufficient to justify the exception. A search warrant, under Rule 41(c)(2), is now only a phone call away. A warrantless search will require a more compelling showing of exigency than has previously been required. Moreover, Rule 41(c)(2) has given federal courts additional grounds to exclude evidence obtained in a warrantless search. Non-use of a telephonic search warrant may invoke the supervisory power of the federal courts to enforce compliance with the requirements of the Federal Rules of Criminal Procedure.

In addition, the judiciary has manifested its preference for the use of telephonic search warrants in its decisions,[58] through its rule-making authority,[59] and administratively.[60] The inevitable conclusion must be that the availability of this method of obtaining a search warrant has changed the equation for determining the exigent circumstances exception to the Fourth Amendment's Warrant Clause.

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[54] An amendment to Rule 41 to authorize a search warrant for "persons" would also provide support for suppression of the fruits of such a search for failure to use Rule 41(c)(2), as an exercise of the court's supervisory power. *See* notes 24-40, *supra* and accompanying text.

[55] *See, e.g.*, United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976).

[56] *See, e.g.*, United States v. Burke, 517 F.2d 377 (2d Cir. 1977).

[57] Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971). *See* note 5, *supra*.

[58] United States v. Robinson, 533 F.2d 578, 585 (D.C. Cir. 1976). *See* note 23, *supra*.

[59] Fed.R.Crim.P. 41(c)(2). *See* notes 1 & 29, *supra* and accompanying text.

[60] *See* notes 30-31, *supra*.